IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1916.

No. 35345. No. 484

Kate P. McNaughton,

Appellant,

vs.

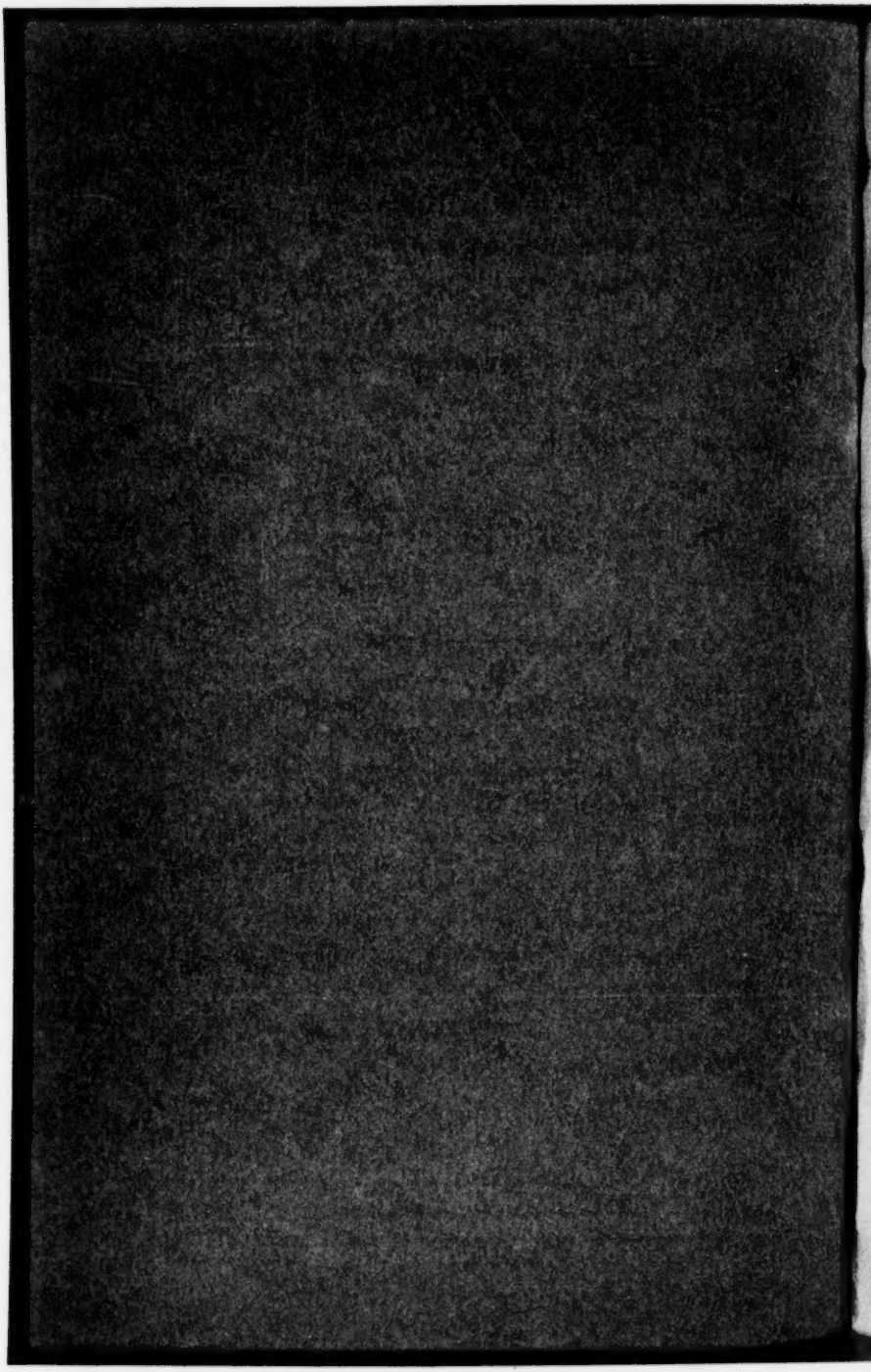
Hiram W. Johnson, Governor of the State of California, U. S. Webb, Attorney General of the State of California, and Thomas Lee Woolwine, District Attorney of the County of Los Angeles, State of California,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

APPELLANT'S BRIEF.

TOM L. JOHNSON,
Counsel for Appellant.



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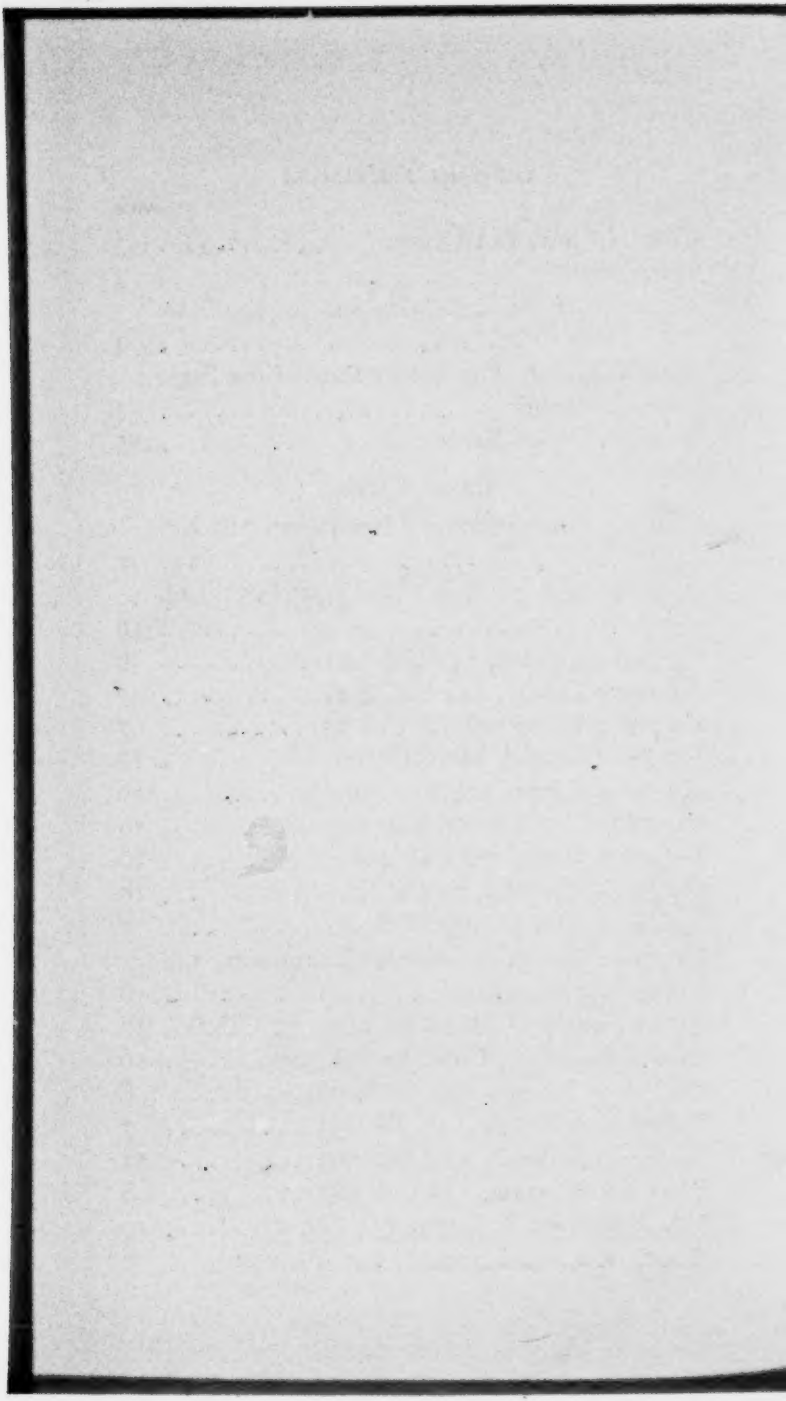

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APPELLANT'S BRIEF.

This is an appeal from an order denying an application for an interlocutory injunction seeking to restrain the attorney general of the state of California and the district attorney of the county of Los Angeles, California, from enforcing the provisions of the law enacted by the legislature of the state of California, and known as the Optometry Law of the state of California, and fully set forth in the original bill of complaint herein. Said application was made under the provisions of section 266 of the Judicial Code of the United States and heard before Erskine M. Ross, circuit judge of the United States, O. A. Trippet and E. E. Cushman, district judges of the United States.

The act of the legislature of the state of California known as the Optometry Law, com-

plained of by the appellant herein as being in contravention of her rights under the Fourteenth Amendment of the Constitution of the United States, is fully set forth in plaintiff's original bill of complaint filed herein.

Section 1 of said act provides:

> "It shall be unlawful for any person to engage in the practice of optometry without first having obtained a certificate of registration from the State Board of Optometry."

Section 2 of said act provides:

> "That the practice of optometry is hereby defined to be the employment of any means other than the use of drugs for the measurement of the powers or range of human vision, or the determination of the accommodative and refractive states of the human eye or the scope of its function in general, or the adaptation of lenses or frames for the aid thereof."

Section 10 of said act is as follows:

> "The provisions of this act shall not be construed to prevent any licensed physicians and surgeons from treating the human eye or fitting glasses to the human eye, and section 2 of said act expressly relieves from the operation of said law all those who use drugs, for the measurement of the powers or range of human vision, or in determining the accommodative and refractive state of the human eye."

It is the contention of plaintiff that by reason of the fact that the law specially exempts from its operation all those practitioners who employ drugs in measuring the range of human vision, discriminates against all those who employ any other means than the use of drugs, and that the act is, therefore, special and discriminatory and

creates a monopoly favored and protected by law, in the interest of practitioners who employ drugs in determining the accommodative and refractive state of the human eye in contravention of the rights of the complainant under the Fourteenth Amendment of the Constitution of the United States.

That said pretended law under the guise of a police regulation is in fact not a *bona fide* exercise of the reasonable discretion of the legislative department of the state, in the interest of public health and welfare, but that it creates a monopoly favored by law in the protection of those who employ drugs in the measurement of the range of human vision and in determining the accommodative and refractive states of the human eye. The mere assertion by the legislature that a statute relates to the public health, safety or welfare does not in itself bring that statute within the police power of the state, for there must be some apparent danger to the public and the regulations must be the means of eradicating the evil or avoiding the danger and there must be some obvious and real connection between the actual provisions of the police regulation and its avowed purpose.

This police regulation to be valid must be not only reasonable but in fact adapted to the protection of the public health and welfare.

Can it be successfully contended that the act

in question under the guise of a police regulation is in fact and in good faith a proper exercise of the police power when it imposes restrictions only on that class of practitioners who employ the mechanical and harmless method in measuring the range of human vision and relieves from the operation of the law that class of practitioners who employ drugs in measuring the range of human vision and in determining the accommodative and refractive states of the human eye? The use of drugs being the only really dangerous practice demanding in the interest of the public protection by police regulation, we insist that the act in question discriminates against the plaintiff herein and arbitrarily deprives her of her rights to pursue her profession as a doctor of opthalmology in measuring the range of the human eye and in adapting suitable lenses thereto without the use of drugs.

In *Ex parte* Hayden, 147 Cal. 649, the Supreme Court of this state held as follows:

> "It has come to be well recognized that the liberty and the pursuit of happiness in which the individual is protected by the Constitution of the United States and of the state applies as fully to his right of contract, his right to follow a legitimate vocation, untrammeled by unnecessary regulations, as it does to the freedom from arrest or restraint of his person. This subject has received recent consideration

by this court, and it is unnecessary to do more than refer to *Ex parte* Dickey, 144 Cal. 234, 103 Am. St. Rep. 82, 77 Pac. 924.

"Putting out of contemplation, therefore, the fundamental right of the government to subject private property to taxation and to take such property in time of public calamity and peril, the right of the state to impose burdens upon such property where the business is legitimate and innocuous—in other words, to regulate harmless vocations—is found in the police power alone. (Young v. Commonwealth, 101 Va. 853, 45 S. E. 327; Holden v. Hardy, 169 U. S. 266, 18 Sup. Ct. 383.) The police power deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public welfare, the public health or the public morals. (Cooley on Constitutional Limitations, 7th Ed., p. 837; Ruhstrat v. People, 185 Ill. 133, 76 Am. St. Rep. 30, 47 N. E. 41.) But the legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property. By this court it has been said (*Ex parte* Whitwell, 98 Cal. 73, 35 Am. St. Rep. 152, 32 Pac. 870): 'But it is not true that when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As

> the right of a citizen to engage in such a business or follow such a profession is protected by the constitution, it is always a judicial question whether any particular regulation of such right is a valid exercise of legislative power. * * * This principle is stated very forcibly in the case of Mugler v. Kansas, 123 U. S. 661, 8 Sup. Ct. 273, in the following language: "The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."'"

See also the following language in *Ex parte* Dickey, 144 Cal. 234:

> "The limit to the exercise of police power in these cases must be this: 'The regulation must have reference to the comfort, safety or welfare of society.' In the same connection, this court has said (Sonora v. Curtin, 137 Cal. 583): 'A police regulation or restraint is for the purpose of preventing damage to the public or to third persons. There are certain lines of business and certain occupations which require police regulation because of their peculiar character, in order that any

harm may not come to the public or that the threatened danger may be averted. Where the profession or business is not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation for revenue.' It appears, therefore, that the due exercise of the police power is limited to the preservation of the public health, safety and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police regulation.

"The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety, or morals. Nor, indeed, is the purpose of this statute to regulate in these regards, or in any of them. The declared purpose and the plain effect of the above-quoted section is to limit the right of an employment agent in making contracts, a right free to those who follow other vocations, and arbitrarily to fix the compensation which he may receive for the services which he renders.

"Here, then, is laid down a most drastic rule governing the conduct of a man in the prosecution of a harmless, legitimate and beneficial business. Under the Constitution of the United States and of this state, the protection guaranteed in the possession of property and in the pursuit of happiness is extended, as of necessity it must be, to cover the right to acquire

property, and the right to acquire property must and does include the employment of proper means to that end. Says Judge Cooley (Constitutional Limitations, 7th Ed., p. 889): 'The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others. This general right cannot be done away.'"

Ex parte Drexel, 147 Cal. 763;

1 L. R. A. (N. S.) 813;

129 Am. St. Rep. 293;

14 L. R. A. 581;

Ex parte Knapp, 127 Cal. 101;

Ex parte Sing Lee, 96 Cal. 354;

Von Harlingen v. Doyle, 134 Cal. 53;

In the Matter of Mary Maguire, 57 Cal. 604;

Lassen County v. Cone, 72 Cal. 387;

Ex parte Jenzsh, 112 Cal. 468;

Diepenbrock v. Superior Court, 153 Cal. 597;

Particularly *Ex parte* McNulty, 77 Cal. 164;

Hewitt v. Board of Medical Examiners, 148 Cal. 595.

It is not within the power of the legislature to enact a special law under the guise of a police regulation as the act complained of granting immunity to the practitioner who employs drugs in determining the accommodative

and refractive states of the human eye and imposing police regulations upon all others who do not employ drugs in their practice. Under the law complained of the practitioner who employs drugs in determining the accommodative and refractive states of the human eye is not amenable to the law. He may pursue his practice in the use of drugs on the human eye and work irreparable and incurable injury upon the public so long as he does not make use of the harmless and simple appliances known as the trial frame and test card, and it would be antagonistic to reason to hold that such an act is valid and authorized by the police power of the state. If any act could be so framed as to be more unreasonable and unjust in its application in this regard we fail to see how it could be so.

Quoting from the opinion rendered in the case of the State v. Gardner, 58 Ohio 599, 41 L. R. A. 689, the Supreme Court of that state held a certain law which endeavored to regulate the licensing of plumbing unconstitutional because of its unequal and unjust discrimination between persons engaged in the same calling, the following language is used:

> "Our bill of rights prohibits granting of privileges to one which are denied to others engaged in the same calling or profession, and the imposition of restrictions,

> burdens and police regulations upon certain citizens from which others engaged in the same business are exempt is in violation of the constitutional guarantee under the Fourteenth Amendment of the Constitution of the United States and is therefore void. A statute, therefore, which arbitrarily discriminates between persons engaged in the same business or profession cannot be sustained because it is in contravention of the equal rights which all are entitled to in the equal enforcement of the law, under the guarantees of the Fourteenth Amendment of the Federal Constitution."

That plaintiff is a graduate of the McCormick Medical College of Chicago, a reputable school of scientific knowledge, teaching the practice of opthalmology and neurology without the use of drugs, an institution duly incorporated under and by virtue of the laws of the state of Illinois. That plaintiff is in every way qualified to practice her profession of opthalmology. That the act herein complained of arbitrarily discriminates against every other school of scientific knowledge and practice in favor of the school employing drugs in determining the accommodative and refractive states of the human eye and is therefore unconstitutional and void.

That the said act complained of was not authorized by the police powers of the state which extends only to such measures as are

reasonable; that all police regulations must be reasonable under all circumstances; in every case it must appear that the regulations adopted are reasonably necessary and appropriate for the accomplishment of a legitimate purpose. A statute to be within this power must be reasonable in its operation upon the persons whom it affects, not arbitrarily discriminative nor unduly oppressive. The validity of a police regulation, therefore, primarily depends on whether, under all the circumstances, the regulation is reasonable, affording the public the protection intended or arbitrary, and whether it is designed to accomplish the purpose properly coming within the scope of the police power. In order to sustain the legislative inference by virtue of the police power under a statute of a state, it is necessary that the act should have some reasonable relation to the subjects included in such power, and the law must tend, in a degree that is perceptible and clear towards the preservation of the public welfare, and any act failing in this respect cannot claim the protection of the police power of the state. The police power must be exercised to be justifiable toward the prevention of some offense or manifest evil or to the furtherance of some object within the scope of police power. The mere assertion by the legislature that a statute relates to the public health, safety or

welfare, does not in itself bring that statute within the police power of the state, for there must be obvious and real connection between the actual provisions of a police regulation and its avowed purpose, and the regulation adopted must be reasonably adapted to accomplish the end sought to be obtained. Whether a law meets these requirements or not, is a matter to be judicially ascertained and settled by the courts of the country. A constitutional right cannot be abridged by the legislature under the guise of a police regulation, since the legislature has no power under a guise of a police regulation to invade arbitrarily the personal rights and personal liberty of the individual citizen, or to arbitrarily interfere with his business or profession, or to impose unusual and unnecessary or discriminatory restrictions on lawful occupations.

What apparent danger to the health, morals and welfare of the public could have existed that made it reasonable and necessary for the legislature of the state of California to invoke the police power of the state to deny the drugless practitioner the right to determine the accommodative and refractory states of the human eye by the simple and harmless method of employing the trial frame and test card? If the practitioner who employs drugs in measuring the range of human vision and in

determining the accommodative and refractive states of the human eye is not a menace to the public health, morals and welfare of the public, and was therefore relieved from the operation of the said optometry law, why was it necessary to invoke the police powers of the state against the practioner who employed no drugs but the simple, harmless mechanical device known as the trial frame and test card? It is a well known fact that the employment of drugs in any form upon the human eye is at all times extremely dangerous and usually followed by disastrous results. If it is not necessary under the act complained of for the practitioner who uses drugs on the human eye to possess certain knowledge or qualifications, why was it necessary that the drugless practitioner should possess these qualifications? That under the act complained of the plaintiff is denied the equal protection of the law in contravention of her rights under the Fourteenth Amendment of the Constitution of the United States.

Police regulations cannot arbitrarily interfere with the enjoyment of the rights of property, or the personal rights guaranteed by the Federal Constitution, and where a business or profession in itself is harmless and legitimate, the power of the state to regulate it is not the equivalent of the power to destroy. All statutory restrictions are imposed upon the theory

that they are necessary for the safety, health or comfort of the public.

Hence, if a restriction or regulation is without reason or necessity, it cannot be enforced. Police regulation which impairs or destroys, rather than preserves and promotes, is within the condemnation of the constitutional guarantee. It has been said that the scope of the term "reasonable" as regards any regulation must be measured, having regard to the fundamental principles of human liberty as understood at the time of the formation of the constitution adapting the same to modern conditions, and the measure of the reasonableness of a police regulation is what is appropriate under all the circumstances to the purposes to be attained, and whether or not it is in fact a *bona fide* exercise of the police power of the state, whether it was really intended to protect the public against the threatened danger or to affect some private or questionable purpose. These matters are proper for judicial determination. It is also said that in proportion to the severity or extent of the police regulations must a strict observance of the constitutional limitations upon the police power be required, and if a statute invades the rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution.

We maintain, first, that the practice of optometry or the measuring of the range of human vision by the use of the simple and inoffensive trial frame and test card is a practice in itself absolutely inoffensive and harmless and not subject to police regulation. Second, that the act complained of, known as the optometry law, is not a *bona fide* exercise of the police power in that it makes no attempt to protect the public from the indiscriminate use by incompetent practitioners of dangerous drugs in determining the accommodative and refractory states of the human eye, but expressly relieves them from the operation of the law.

That the said law is special, highly discriminatory and void because the act in question arbitrarily exempts the practitioner who employs drugs from its operation and imposes arbitrary and unjust burdens as against every other person employing any other means than drugs in determining the accommodative and refractive stages of the human eye. That the said act creates a monopoly favored by law in the practice of optometry by the use of drugs. That under the terms of said act complainant is denied the equal protection of the law in contravention of her rights under the Fourteenth Amendment to the Constitution of the United States, and it is, therefore, unconstitutional and void.

Respectfully submitted,
TOM L. JOHNSTON,
Attorney for Plaintiff.